

ELLA S. SHELDON ET AL.

IBLA 75-485, etc.

Decided August 27, 1979

Appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting Native allotment applications F-18155, etc.

Set aside and remanded.

1. Administrative Procedure: Hearings – Alaska: Native Allotments – Rules of Practice: Hearings

Where issues of material fact are in dispute, due process requires that an applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

2. Administrative Procedure: Generally – Administrative Procedure: Hearings – Alaska: Native Allotments – Contests and Protests: Generally – Hearings – Rules of Practice: Government Contests

Where the Bureau of Land Management determines an application for a Native allotment should be rejected for failure to establish use and occupancy of the land, the Bureau of Land Management should initiate a contest proceeding pursuant to 43 CFR 4.451.

3. Alaska: Native Allotments – Secretary of the Interior  
A decision rejecting a Native allotment application because there was not 5 years

of use and occupancy of the land prior to a withdrawal affecting the land, will be set aside and the case remanded to the Bureau of Land Management for readjudication in accordance with Secretarial Order No. 3040 of May 25, 1979, which rescinds a former guideline requiring the 5 years prior to the withdrawal and now permits allotment after 5 years use and occupancy has been completed provided the applicant had either filed an application or commenced use and occupancy prior to a withdrawal.

APPEARANCES: Alaska Legal Services Corporation for appellants.

#### OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The appeals listed in Appendix A all involve Native allotment applications filed pursuant to the Act of May 17, 1906, (hereinafter the Act), 34 Stat. 197, as amended by the Act of August 2, 1958, 70 Stat. 954, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)), and the implementing regulations at 43 CFR Subpart 2561. All of the applications were rejected in whole or in part in 1975 by the Alaska State Office, Bureau of Land Management (BLM), for failure to establish the use and occupancy required by the Act. <sup>1/</sup> Because the central issue in each case is the nature and extent of use and occupancy of the land by the applicants, the appeals have been consolidated for the purposes of this decision.

[1] In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the United States Court of Appeals ruled that where issues of material fact are in dispute, due process requires that the applicants

must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

Pence v. Kleppe, *supra* at 143.

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<sup>1/</sup> Action on these appeals was stayed pending rulings from the United States Court of Appeals in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

Following that decision, the Board ruled that applying the Departmental contest procedures, 43 CFR 4.451, would satisfy the requirements of due process. Where a factual issue exists as to the applicant's compliance with the use and occupancy requirements of the Act,

BLM must initiate a contest giving the applicant notice of the alleged deficiency in the application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application. Donald Peters, 26 IBLA 235, 241-242, 83 I.D. 308 (1976), reaffirmed, 28 IBLA 153, 83 I.D. 564 (1976).

John Moore, 40 IBLA 321, 324 (1979). Recently, the Court of Appeals held that the Departmental contest procedures satisfy, at least facially, the due process requirements set forth in Pence v. Kleppe, supra. Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

[2] All of the appellants challenge the rejection of their applications without affording them an opportunity for a hearing. In most of the cases the decisions were based upon field reports of examinations of the allotment claims by BLM field examiners. They included, for example, statements that the allotment applicant had admitted to the examiner that he/she had never been on certain parcels or that the applicant had only been on the claim as a child in the company with his/her parents. They also include statements made to the examiner by others that the applicant had not used or occupied the land. The field reports are a sufficient basis for a Government contest against such claims. Since the Pence decisions, however, they may not be the basis for a decision rejecting the application because of insufficient use and occupancy without affording the applicant an opportunity for a hearing. Accordingly, a Government contest must be initiated pursuant to 43 CFR 4.451 where it is determined that an allotment application should be rejected for failure to establish the required use and occupancy of the land.

Appellants have raised many issues in these appeals. The right of Native allotment applicants to a hearing was resolved in the Pence litigation, supra. Except to the extent prior decisions of this Board should no longer be followed on the hearing issue because of Pence, or on the 5-year occupancy before a withdrawal rule because of Secretarial Order No. 3040, discussed infra, many of the other issues raised by appellants have been decided by prior decisions of the Board. For example, see cases cited in John Moore, supra; Stanley P. McCormick, 23 IBLA 304 (1976); Cecil R. Sholl, 23 IBLA 17 (1975); Natalia Kepuk, 23 IBLA 99 (1975). To the extent there may be issues raised in a

specific case here which possibly have not been fully answered by prior decisions of the Court of Appeals and this Department, such issues may best be resolved after a hearing if there remain factual disputes. For this reason, we do not make any ruling at this time on the adequacy of the use and occupancy alleged by any applicant. That determination will best be made following a hearing where all the facts have been ascertained. The facts should establish the type and extent of the use, whether others may have used and occupied the land, whether there may have been a failure to substantially continue to use or occupy land or an abandonment of the land by an applicant for a substantial period from the time asserted to the date of the application, and all other matters which would show the factual basis for ascertaining whether the requirements of the Act have been satisfied.

[3] The decision rejecting Nathaniel Englishoe, Jr.'s, application was specifically based upon the fact his application did not show 5 years use and occupancy prior to a segregation of the land on January 9, 1963, for the proposed Rampart Canyon Power Project. Englishoe's application indicated his use and occupancy initiated on December 1, 1960. The BLM decision was in accord with a Secretarial guideline in effect then requiring that the 5-year period of use and occupancy by a Native be completed prior to a withdrawal or segregation of the land. However, that guideline has recently been rescinded by Secretarial Order No. 3040 of May 25, 1979, which states a rule requiring that the "full five years use and occupancy must be completed prior to the granting of the Native allotment application, provided that the applicant has either filed for a Native allotment or commenced use and occupancy prior to a withdrawal of the land." Therefore, Englishoe's application should be readjudicated in accordance with this Secretarial Order, and pursuant to this decision.

Some of these cases involve conflicting state, village, and Native allotment selection applications. For each case, BLM should determine all adverse parties, including other Federal agencies, giving notice, and, if the adverse interest is substantial, an opportunity to participate in any proceedings. In the event BLM approves a Native allotment application, any conflicting applicant should be given notice and an opportunity to initiate a private contest. See State of Alaska, 40 IBLA 79 (1979).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

decisions appealed from are set aside and the cases remanded for further proceedings consistent with this decision.

Joan B. Thompson  
Administrative Judge

I concur.

Anne Poindexter Lewis  
Administrative Judge

## APPENDIX A

<u>APPLICANTS NAME</u>	<u>IBLA NO.</u>	<u>NATIVE ALLOTMENT NO.</u>
Ella S. Sheldon	75-485	F-18155
Patricia N. Miethenan	75-491	F-14487
Elena Peters	76-134	F-17966
Eunice Tritt Williams	76-289	F-17458
Fannie M. Stienfield	76-411	A-060537
Nathaniel Englishoe, Jr.	76-453	F-14716
Robert Nicholai	76-476	AA-6434

## ADMINISTRATIVE JUDGE STUEBING CONCURRING:

The main opinion correctly states the principles which control our disposition of these cases and mandate their remand to BLM. However, I am concerned by the factual details indicated by the record in two of these cases.

In the appeal of Patricia N. Miethenan (Bussard), allotment application F-14487, the BLM decision rejected her application for allotment of four separate parcels of land on the basis of the field examiners' report, which stated that the applicant accompanied them to each of the parcels, but that she could not locate or identify parcels A, C, or D, and stated to the examiners that her application had been filled out by her former husband, and she declared to them that she had never been to any of these three tracts. Parcel B was rejected on the strength of the report that although appellant stated that she had been on this tract, the several Native residents of Eagle interviewed all declared to the examiners that she had not used Parcel B, and that she had never been "down the river" (toward Parcel B) more than once or twice, if at all. Moreover, the report stated, applicant claimed use of Parcel B from June 10, 1968, but seven members of the Village council had signed a statement that she had not been in Eagle in 1968.

The appeal from this decision did not appeal the rejection of Parcels A, C, and D, and concerned only the rejection of Parcel B. With reference to Parcel B, the appeal made no allegation that she had used and occupied the land for 5 years, but only contended that the law does not require that she do so in order to qualify, a contention rooted in law only. Thus, it does not appear that there are any material facts in dispute, and the only tract for which appellant is still contending is Parcel B.

The second case with which I am especially concerned is the allotment application F-17458 of Eunice Tritt Williams. This application was rejected by BLM on the basis of the report of the field examiner who stated that both the applicant and her brother had told the examiner that she had only been on the land once or twice as a small child. The applicant herself reportedly told the examiner that she has no clear recollection of having been there, but her grandmother had told her that she had been on the land.

The appeal from this decision does not dispute the facts upon which the decision was premised, merely maintaining that as the land applied for is not in a national forest, she need not show 5 years use and occupancy to qualify – an argument of law which has been rejected by this Board in many prior cases. Appellant's statement of reasons was subsequently amended to request that she be granted an oral hearing pursuant to the holding in Pence v. Kleppe, 529 F.2d 135 (9th

Cir. 1976), although she has still not denied the truth of the statements attributed to her or raised any other factual issue.

Nevertheless, Pence v. Kleppe, supra, holds that even though the applicant may communicate with the field examiner and accompany the examiner on his inspection of the site, his report cannot serve as the sole basis for the decision rejecting the application.

Unfortunately, the facts relied upon by BLM are only recited in the reports of field examination. Had the examiners obtained signed, verified statements of what they were allegedly told by these applicants, I would not consider a hearing necessary unless such statements were subsequently repudiated. By analogy, this Department has long recognized the right of a homesteader to notice and hearing before rejection of his final proof unless in making and submitting his final proof he himself demonstrates his own failure of entitlement as a matter of law, in which case no hearing is necessary. See e.g., Ronald E. Geiger, 37 IBLA 33 (1978).

But in these cases, as the facts relied upon by BLM are found exclusively in the field examination reports, I agree that Pence requires notice and opportunity for hearing notwithstanding that these applicants have already been notified of the reasons for the rejection of their applications and their responses have not challenged the facts asserted.

Edward W. Stuebing  
Administrative Judge

